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TOM PAINE'S CONSTITUTION

Robin West*

INTRODUCTION

IN *Common Sense*, our brief for the American Revolution, the pamphleteer Tom Paine famously declared that “in America the law is king.”¹ We have been repeating the sentiment in patriotic and legalistic ceremony ever since. Surprisingly little attention has been devoted in either constitutional scholarship or jurisprudence, however, to what Paine might have meant by this, beyond his desire to demythologize and revolt against monarchic prerogatives. What, precisely, is the “law” that Paine declared to have dethroned the king?

Does the phrase, penned by the advocate not only of our own revolution, but also of the rights of man everywhere,² presage our modern practice of rights-based constitutionalism?³ By the “law”

* Professor of Law, Georgetown University Law Center. Many thanks to Louise Weinberg for encouragement, comments, and criticisms of early drafts of this piece.

¹ Thomas Paine, *Common Sense*, in *Collected Writings* 5, 34 (Eric Foner ed., 1995) (emphasis omitted).

² See Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution*, 1791, in *Collected Writings*, supra note 1, at 433 [hereinafter Paine, *Rights of Man*, Part One]; Thomas Paine, *Rights of Man Part the Second: Combining Principle and Practice*, 1792, in *Collected Writings*, supra note 1, at 541 [hereinafter Paine, *Rights of Man*, Part Two].

³ Professor Paul Kahn provocatively, if indirectly, suggests this in his masterful philosophical exegesis of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by using Paine's famous remark as the title of the introductory chapter in his book on the case. Paul W. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America* 1 (1997). As this Article will make clear, I think Professor Kahn's analysis of the philosophical and historical meaning of *Marbury* is largely convincing, but I do not think that Paine can be enlisted to promote the cause of constitutionalism as expounded by Marshall in that case, or by the Rehnquist, Warren, or Burger Courts of today. In a slightly more expansive, but similar use, Professor Robert Ferguson uses Paine's aphorism as the title of the first chapter in his extraordinary book on the American idea of law at the time of the founding. Robert Ferguson, *Law and Letters in American Culture* 11 (1984). Professor Ferguson then suggests in the text that Paine's passionate embrace of the secular ideal of legalism echoed the highly idealistic, richly humanistic, classically trained Jeffersonian conception of natural law embraced by many of the Framers. *Id.* at 16. Again, although Professor Ferguson's description of the classical and natural law conception of legalism at the time of the

that is to be king, might Paine have meant a body of *constitutional* law that invoked Paine's beloved "rights of man" to constrain the political power of the legislatures, just as in a well-functioning monarchy the king, acting benignly with God's helping hand and in the interest of his subjects, constrains the political power of those merely mortal parliamentarians? This would give the declaration a pleasing sort of prescience and an historical symmetry: We replace the king with constitutional law and then bestow upon that law the power, the virtue, and the near-irrebuttable moral authority traditionally associated with kings. Further, we accordingly reward it not only with obedience, but reverence. The reverence, however, is directed toward a worthy recipient—reasoned, principled, constitutional law—rather than an unworthy one—whimsical boy-kings, rhetorically blessed by the sun's rays but in fact moved by self-aggrandizement, a lust for domination or empire, or worse. To paraphrase Paine, in America, the law of the Constitution, consisting of moral principles and emanating from the people themselves, constrains the whimsy of momentarily empowered, self-interested representatives. In America, constitutional law, rather than man, is king.

This reading—in America, constitutional law is king—might also make Paine an early friend of judicial review, as he was unquestionably a friend of United States constitutionalism, both federal and state. In fact, by interpreting the "law" that is king in Paine's declaration as, at core, a set of constitutional principles both limiting politics and protecting the rights of man, Paine's manifesto can be read as having foreseen the unfolding of our modern, court-centered constitutional consciousness: A body of moral principles, derived through reason, protects our rights and is enforced *as law* by courts against the power of political authority. These moral principles are sanctioned, unlike the monarchical claims to power and virtue it displaced, by the Constitution's claim to speak for and on behalf of the people. On this reading, the telling difference between American law and English monarchy is that in America, it is law, meaning constitutional law, and not the king, that serves this antipolitical, moral, and principled function. The commonality,

framing is a compelling one, it does not seem to fit either the writing or activism of the populist and democratic Paine.

however, is just as important. In America, no less than in England, the excesses of politics are confined or checked in the name of moral principle: in England, by the benign hand of the king; in America, far more happily, by the settled wisdom of law and the courts that are both constrained and empowered to uphold it.

Pleasing and even natural though such an interpretation may be, however, my first contention in this Article will be simply that it is an untenable reading of Tom Paine's philosophy. Neither Paine nor his famous utterance can be drafted fairly to the cause of judicial review or, more generally, to court-centered constitutionalism. Rather, on the basis of Paine's collected writings, I think it is fair to venture that Paine would have faulted our contemporary rights-based, judge-produced constitutional law on the straightforward grounds that it is thoroughly undemocratic. The evidence for this is partly negative; nowhere (that I can find) does Paine explicitly advocate court-centered judicial review. Although Paine repeatedly characterized the Constitution as "law,"⁴ nowhere did he equate or even characterize a constitution as a body of laws to be enforced *by courts*. Further support—indirect but more compelling—comes from Paine's attitude toward judicial power, which was unrelentingly hostile. As I will show below, when Paine spoke of courts, the common law, the rule of precedent, common law judges, and even of lawyers, he was as scathing and contemptuous as when he spoke of the King.⁵ Lastly, Paine's faith in unfettered representative democracy was likewise robust and uncompromising; he believed fervently that we, meaning each generation, should be ruled by our own representatives, rather than by our ancestors. He despised the idea of rule of the living by the dead as much as he despised monarchy, and he argued in any number of contexts, in contrast to Edmund Burke,⁶ that the point of democracy and democratic rule was precisely to counter, not preserve, the over-

⁴ Paine, Rights of Man, Part One, *supra* note 2, at 468; Paine, Rights of Man, Part Two, *supra* note 2, at 574.

⁵ Paine, Rights of Man, Part Two, *supra* note 2, at 582–84.

⁶ Paine subtitled his first rights of man essay "an Answer to Mr. Burke's Attack on the French Revolution." Paine, Rights of Man, Part One, *supra* note 2, at 433. In his *Reflections on the Revolution in France*, Edmund Burke has offered a vigorous defense of monarchic authority and privilege, as part of a traditionalist justification of law and the state. Edmund Burke, *Reflections on the Revolution in France* (J.C.D. Clark ed., 2001).

bearing weight of tradition.⁷ His view of human nature underpinning this robust faith in contemporaneous democracy was as optimistic as his faith in democracy was absolute. He held what he called the “republican” view that governors should legislate in the spirit of and toward the end of the common good of *all* people,⁸ and he held the “democratic” view that representative democracy is the best way to ensure that they will do so. Fully enfranchised people themselves, rather than anyone purporting to act on their behalf (whether or not disingenuously), Paine believed are best able to discern that good.⁹ Throughout his tumultuous political life, he clung to the hope that relatively unfettered commerce, lightly regulated by lawmakers who were (1) representatives of people armed with voting power and (2) acting in the public interest, would enhance both equality and freedom and correct the grotesque maldistributions of wealth that Paine thought were entirely a function of generations of unchecked monarchic and oligarchic privilege.¹⁰ The “law” that Paine hoped to see displace the king was that declared by an elected, representative branch, acting in the interest of and with the authority of the people. The law that should replace the king in Paine’s commonsensical utterance was not the common law declared by judges, nor a natural law stemming from an authority higher than that of any mortal sovereign, nor a body of moral-constitutional principles designed or divined by courts and enforced against the democratic, political branches. It was, rather, the law as expressed by representatives doing the will of the people, and acting in the interest of all. In short, despite his passion for the developing legal-political culture in the newly formed United States, Paine wrote primarily within a radical English political tradition of popular legislative supremacy and never really veered from it.

Just as clearly, however, the story must be more complicated than that. The unreconstructed republican-democrat Thomas Paine was as renowned for his passionate defense of rights and un-

⁷ See Paine, *Rights of Man*, Part One, *supra* note 2, at 438–39; Paine, *Rights of Man*, Part Two, *supra* note 2, at 594–95.

⁸ Paine, *Rights of Man*, Part Two, *supra* note 2, at 565–71.

⁹ See *id.* at 567–68.

¹⁰ The best treatment of Paine’s political philosophy and advocacy is Eric Foner, *Tom Paine and Revolutionary America* (1976).

abashed love of constitutionalism as for his advocacy of democracy and denunciation of kings. Further, in both *Rights of Man, Part One* and *Rights of Man, Part Two*, Paine refers to a constitution, and particularly to the Pennsylvania Constitution for which he actively campaigned, as “law.”¹¹ He clearly envisioned the role and point of any constitution in a democratic society as a law that governs the governors, a law that dictates, in legalistic fashion, what can and cannot be done, and what must and must not be done, by the government for and on behalf of the people. Thus, in an early passage in *Rights of Man, Part One* devoted to the topic of constitutionalism, Paine defines a constitution:

A constitution . . . is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made; and the government is in like manner governed by the constitution.¹²

Paine advocated, in other words, what some today would call a “legal,” as opposed to a “political” or “populist” or “aspirational,” constitution.¹³ The Constitution truly is law, not politics. It governs, controls, constrains, and restrains the governors. What did not follow from this distinction for Paine was what seemingly follows for most of us today—that because a constitution is “law” it must therefore be enforced or interpreted by courts. Paine never speaks of a “law of the constitution” or of a “constitutional law,” *enforced by courts*, constraining the power of the people’s representatives, and thus acting in accord with the Constitution but against the will of the people. Nowhere does Paine couple his passion for constitutionalism and the rights of man with a hint of support for the insti-

¹¹ Paine, *Rights of Man, Part One*, supra note 2, at 467–68; Paine, *Rights of Man, Part Two*, supra note 2, at 574.

¹² Paine, *Rights of Man, Part One*, supra note 2, at 468.

¹³ Contrast the “thin,” aspirational, and populist constitution described and advocated by Mark Tushnet. Mark Tushnet, *Taking the Constitution Away from the Courts* 9–14, 50–52, 62–67, 106–13, 123–28, 166–68 (1999). See also Hendrik Hartog, *The Constitution of Aspiration and “The Rights that Belong to Us All,”* 74 J. Am. Hist. 1013 (1987) (describing the history of constitutional rights used as political rhetoric); Robin West, *The Aspirational Constitution*, 88 Nw. U. L. Rev. 241 (1993) (arguing for more expansive use of constitutional welfare rights outside the courts).

tution of judicial review, either in the limited *Marbury v. Madison*¹⁴ sense in which it was used toward the end of his life or in the more robust “rights-oriented” form defended by proponents or attacked by critics today.¹⁵ Thus Paine embraced views that seem irreconcilable today. The most ardent advocate of democracy espoused legal constitutionalism and a passion for rights, while maintaining a hostility toward courts, a disdain for precedent, an absolute antagonism for the rule of the living by the dead, an equally absolute faith in the good will and intelligence of democratically elected representatives, and a pregnant silence on the question of judicial review. That curiosity suggests the first set of questions I will consider in this Article: If it was not our familiar Constitution with its accompanying individual rights to be enforced by the apolitical courts against the political branches, what was the Constitution to Tom Paine? What was his conception of constitutional law? Of the rights of man? Most importantly, what did Paine, a zealous advocate of our revolution, think was the nature of law? How did Paine’s constitution and jurisprudence differ from the constitution envisioned and the jurisprudence employed by Chief Justice John Marshall? What ground, if any, did they share? The first Part of this Article will attempt to answer those questions.

In the second Part of this Article, I will project this contrast into the present. If something closer to Paine’s constitution, rather than Marshall’s, had been the first step on our constitutional path, how might that path have diverged from the one we in fact followed? How might our constitutional practices be different today if Marshall had regarded the constitution he was enforcing in *Marbury*, and later expounding in *McCulloch v. Maryland*,¹⁶ more along the lines envisioned by Paine? In Part II I will draw out the contrast between Paine’s constitution and modern constitutionalism.

¹⁴ 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Marshall recognized the validity of judicial review in the limited context of ministerial duties of members of the executive branch and may have intended its use only in cases of clear contradictions between positive law and constitutional text. *Id.* For a full argument that Marshall’s understanding of judicial review was confined to these limited cases, see Sylvia Snowiss, Text and Principle in John Marshall’s Constitutional Law: The Cases of *Marbury* and *McCulloch*, 33 J. Marshall L. Rev. 973, 981–88 (2000).

¹⁵ The now classic defense of rights-based judicial review is Ronald Dworkin, Taking Rights Seriously (1977).

¹⁶ 17 U.S. (4 Wheat.) 316, 407 (1819).

I will suggest in the third Part some of what we may have lost by turning our backs on Paine's alternative constitutional vision. First, we have lost our appreciation of the Constitution as the creator, protector, and guarantor of representative democracy. Second, we have lost our appreciation for the character and political virtue of what might best be called the "constitutional legislator"—the legislator who considers legislating in accordance with the law, constitutional law in particular, to be his work. Finally, we have lost an understanding of, and certainly an appreciation for, our affirmative legal constitution—that is to say, an understanding of what the Constitution *requires* of lawmakers, instead of simply what it prohibits. I will leave to the reader the question of whether the flame of rights-based, court-produced constitutional law has been worth the candle it has consumed.

I. PAINE AND CHIEF JUSTICE MARSHALL'S CONSTITUTIONS: ONE CONTRAST

The ideal constitution that Paine envisioned, and thought (wrongly) that he saw in early American constitutional practice and constitution-making, might best be characterized as both legal and popular. First, as he declared explicitly, the constitution should be "to . . . government a law."¹⁷ What he meant by that phrase, seemingly, was that the government empowered by the constitution should have no power to change it.¹⁸ To that government, the constitution was "law"—thus, Paine's constitutional legalism. Did it follow, however, that because the constitution was "law" it should be enforced, interpreted, or applied by courts? Seemingly not, as nowhere does Paine endorse, or even mention, a judicial role in enforcing the constitution. Rather, the constitution, as Paine suggested in various passages of *Rights of Man*, was to be a law enforced by a process of continual, regular, democratic correction, through popular discussion, legislative loyalty, and legislative in-

¹⁷ Paine, *Rights of Man*, Part Two, *supra* note 2, at 574; see also *id.* (stating that the constitution serves as a "law of controul [sic] to the government").

¹⁸ See Paine, *Rights of Man*, Part One, *supra* note 2, at 469; Paine, *Rights of Man*, Part Two, *supra* note 2, at 574–75, 578.

terpretation.¹⁹ We might call this Paine's constitutional populism. This populism was as central to his conception of constitutional value as was legalism: Paine believed constitutions had value because and to the degree that they enhanced popular participation in political processes and strengthened the bond between the decisions of the present governors and the interests of the presently governed.²⁰ Accordingly, it well may have been a given for Paine that constitutions were to be enforced through democratic and political means.

Thus, after describing the Pennsylvania Constitution—the constitution with which he is most closely identified and in support of which he expended considerable political capital²¹—Paine goes on to praise it not only for its legalistic nature, but also for its democratic, popular character:

Here we see a regular process—a government issuing out of a constitution, formed by the people in their original character; and that constitution serving, not only as an authority, but as a law of controul [sic] to the government. It was the political bible of the state. Scarcely a family was without it. Every member of the government had a copy; and nothing was more common, when any debate arose on the principle of a bill, or on the extent of any species of authority, than for the members to take the printed constitution out of their pocket, and read the chapter with which such matter in debate was connected.²²

It is worth emphasizing that while the constitution Paine praised was a law, it was a law held in private homes by families, regarded as a “political bible,” and possessed and relied upon by “[e]very member of the government.”²³ Notable for its absence is any reference to judicial review, or any role for courts at all, in the enforcement of constitutional limits on recalcitrant or overreaching political actors. Rather, to revert to and to amplify Paine's definition of

¹⁹ Paine, *Rights of Man*, Part One, *supra* note 2, at 469; Paine, *Rights of Man*, Part Two, *supra* note 2, at 573–74, 576–78, 594–95.

²⁰ See Paine, *Rights of Man*, Part Two, *supra* note 2, at 594–95.

²¹ See generally Foner, *supra* note 10, at 141–44 (detailing Paine's advocacy of the Pennsylvania Constitution).

²² Paine, *Rights of Man*, Part Two, *supra* note 2, at 574.

²³ *Id.*

constitutionalism recited above, his constitution is directed at legislatures (rather than courts) in precisely the same way in which laws are directed at courts. In modern terms, Paine seemingly envisioned *legislative* rather than judicial attentiveness to the constitutional restraints and requirements for proffered statutes. Just as courts must review ordinary law to apply it in cases that come before them, so must legislatures interpret the constitution so as to legislate in accordance with it.

Moreover, not only is the constitution to be enforced through a process of legislative fealty, but it should be kept current through a process of continual, popular reformulation, revision, redrafting, and amending. In Paine's longest sustained discussion of constitutions, he praised effusively both the American states' constitutions and the French Constitution precisely because, in his view, they could be continually revised and redrafted by the people of the generation to be affected:

One of the greatest improvements that has been made for the perpetual security and progress of constitutional liberty, is the provision which the new constitutions make for occasionally revising, altering, and amending them.

....

The constitutions of America, and also that of France, have either affixed a period for their revision, or laid down the mode by which improvements shall be made. It is perhaps impossible to establish any thing that combines principles with opinions and practice, which the progress of circumstances, through a length of years, will not in some measure derange, or render inconsistent The Rights of Man are the rights of all generations of men, and cannot be monopolized by any. That which is worth following will be followed for the sake of its worth; and it is in this that its security lies, and not in any conditions with which it may be encumbered. *When a man leaves property to his heirs, he does not connect it with an obligation that they shall accept it. Why then should we do otherwise with respect to constitutions?*²⁴

²⁴ Id. at 594–95 (emphasis added).

In similar language, Paine praised the Pennsylvania Constitution precisely because it provided for its own redrafting every seven years:

This [Pennsylvania] convention, of which Benjamin Franklin was president, having met and deliberated, and agreed upon a constitution, they next ordered it to be published, not as a thing established, but for the consideration of the whole people, their approbation or rejection, and then adjourned to a stated time. When the time of adjournment was expired, the convention re-assembled; and as the general opinion of the people in approbation of it was then known, the constitution was signed, sealed, and proclaimed on the *authority of the people* and the original instrument deposited as a public record. . . .

. . . .

No article of this constitution could be altered or infringed at the discretion of the government that was to ensue. It was to that government a law. But as it would have been unwise to preclude the benefit of experience, and in order also to prevent the accumulation of errors, if any should be found, and to preserve an unison of government with the circumstances of the state at all times, the constitution provided, that, at the expiration of every seven years, a convention should be elected, for the express purpose of revising the constitution, and making alterations, additions, or abolitions therein, if any such should be found necessary.²⁵

It seems that by the time of his most considered writing on the topic, Paine's praise of constitutionalism had become entirely conditional upon his understanding that constitutions would give direct voice to the generation of people living under them—thereby enhancing, not constraining, contemporaneous, representative politics.²⁶ He certainly did not evince a preference for the reasoned, adjudicated elaboration of a common law constraining the work of the representative branches. Indeed, to the degree that courts

²⁵ Id. at 573–74.

²⁶ See id. at 594–95.

thwarted the work of legislation, which Paine believed they did through their reliance on precedent, he stood as a critic of judicial involvement.²⁷ More fundamentally, Paine praised the state constitutions, and eventually the federal constitutions of America and France as well, because in his view they placed the power to form government in the hands of the people, thereby severing connections to tyrants, monarchs, conquerors, and others who rule by force.²⁸ He praised constitutionalism when and because it enhanced, rather than constrained, representative democracy.

How does Paine's understanding of constitutionalism as spelled out in *Rights of Man* square with that of John Marshall as set out in the roughly contemporaneous *Marbury v. Madison*? There is less direct conflict than one might at first surmise, given our modern understanding of that case's meaning and importance. Both men speak of the Constitution as law, as do we. Interestingly, however, both are careful to contrast the law that is "constitutional law" with the "ordinary law" that is applied by courts. Neither in *Rights of Man*, nor in *Marbury* is the word "law" ever used to designate, indiscriminately, either "ordinary law" or "constitutional law." In fact, both Marshall and Paine seem to have understood by the unadorned word "law" something that must be modified to ensure sufficient precision. On the one hand, "law" can refer to the ordinary law produced by legislators and which, according to Paine, neither can be made nor altered by courts²⁹—the "legislative act," to use Marshall's phrase.³⁰ On the other hand, the word "law" can refer to the paramount, fundamental, or supreme law of the Constitution.³¹

For Paine, the functional meaning of this distinction was clear: Ordinary law was produced by legislators and then "directed to" and applied by courts, whereas constitutional law was produced by the people and then directed to government.³² The point is often

²⁷ Id. at 583–84.

²⁸ Id. at 573–76, 594–95.

²⁹ Paine, *Rights of Man*, Part One, supra note 2, at 468.

³⁰ *Marbury*, 5 U.S. (1 Cranch) at 177.

³¹ Id.; Paine, *Rights of Man*, Part One, supra note 2, at 468 (stating that the constitution is an act of the people rather than an act of government that the government cannot control or alter); Paine, *Rights of Man*, Part Two, supra note 2, at 574.

³² Paine, *Rights of Man*, Part One, supra note 2, at 468.

lost in discussions of *Marbury*, but Marshall maintains the same semantic distinction. When Marshall speaks of the Constitution as “law,” he qualifies that language: He speaks of constitutional law as a “paramount law,”³³ as a “fundamental” law,³⁴ and quoting Article VI of the Constitution itself, as the “supreme law.”³⁵ Otherwise, he is careful to contrast the Constitution, on the one hand, with ordinary law, on the other.

This distinction between ordinary law and paramount law, and the meaning and significance of that distinction, is important, but it is often lost in our post-realist conversations about John Marshall, *Marbury*, and judicial review. Nowhere in his opinion does Marshall refer to the Constitution as simple, ordinary law, which the courts must interpret and enforce consistent with their role of interpreting the law. Nowhere does he make the quasi-legal realist argument that the courts must have the power of judicial review because, syllogistically, it is the courts’ role to interpret the law, the Constitution is law, and therefore the courts must interpret the Constitution. Rather, when Marshall states that “it is emphatically the province and duty of the judicial department to say what the law is[.]”³⁶ it is clear from the context³⁷ (and also, as a number of historians have now shown, from the historical record³⁸) that the referent of “law” in that sentence is ordinary law. It is the province and duty of the judicial department to say what the ordinary law is, and part of that duty, according to Marshall, is the responsibility of looking to the Constitution to see whether the ordinary law conflicts with it and therefore is void.

³³ *Marbury*, 5 U.S. (1 Cranch) at 177.

³⁴ *Id.*

³⁵ *Id.* at 180.

³⁶ *Id.* at 177.

³⁷ The paragraph in which this statement appears discusses the task courts face when they must deal with two conflicting directives of non-constitutional law. The next paragraph then discusses the task courts must face when dealing with a conflict between non-constitutional law and the Constitution. Marshall found these situations analogous, but not identical. See *id.* at 177–78.

³⁸ See, e.g., Robert Lowry Clinton, *Marbury v. Madison*, Judicial Review, and Constitutional Supremacy in the Nineteenth Century, in *Marbury Versus Madison*, Documents and Commentary 73 (Mark A. Graber & Michael Perman eds., 2002); Snowiss, *supra* note 14, at 981, 986–88; Jeremy Waldron, Judicial Power and Popular Sovereignty, in *Marbury Versus Madison*, Documents and Commentary, *supra* at 181.

No less than Paine, then, Marshall maintains throughout *Marbury* the distinction between ordinary law and the Constitution. In fact, Marshall consistently contrasts, rather than conflates, the two categories to build the case for judicial review. Nowhere is this as clear as in the three paragraphs that most cleanly establish the hierarchical relationship between the law and the Constitution, and the courts' duties regarding both:

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

*Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.*³⁹

In other words, Marshall does make the case for judicial review, but nowhere does he make the syllogistic argument for judicial interpretive supremacy that has been attributed to him, at least since the time of *Cooper v. Aaron*.⁴⁰ The mistake lies in the ambiguity latent in the second premise, that it is the courts' duty to say what the law is. Marshall clearly states that it is the courts' duty to say what the law is and that the Constitution is supreme law. But "law" is not "supreme law," so it does not necessarily follow that it is the courts' duty to say what the supreme law is. Rather, what Marshall says in *Marbury*—and all that he says—is that it is the courts' duty,

³⁹ *Marbury*, 5 U.S. (1 Cranch) at 178 (emphasis added).

⁴⁰ 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

when saying what the ordinary law is, to look to the Constitution to determine whether or not the ordinary law is void. Marshall never says that it is emphatically the duty of the courts to say what the constitutional law is.

Further, nowhere in *Marbury* does Marshall deny the various inferences regarding legislative responsibility for the constitutionality of proposed law that Paine had drawn from the distinction between ordinary law and constitutional law. Marshall does not deny that the legislator should carry the Constitution in his pocket, so to speak, that the Constitution should be a part of legislative debate, or that the Constitution should occupy a place next to the family Bible on the fireplace mantel of American citizens.⁴¹ Nowhere does Marshall suggest—at least in his *Marbury* opinion—that either Congress or the people have no role or only a limited role to play in the interpretation of the Constitution, nor that it would be improper for a legislator to invoke the Constitution when urging a bill, nor that doing so would be some sort of usurpation of judicial authority. Marshall does not even suggest that judicial interpretation should hold an authoritative position over interpretations rendered by coequal branches. To assert that it is the province of the judiciary to decide what the (ordinary) law is in no way undercuts the assumption that it is the province of the legislator to decide what the ordinary law shall be, and that, in accordance with each institution's responsibilities, it is the duty of both to consult the Constitution when doing their respective institutional tasks. Indeed, the defensive style of the discussion in *Marbury* suggests something very much to the contrary. Marshall's argument that courts must look at the Constitution to know whether the ordinary law is law can most naturally be read as resting on the unstated assumption that Congress would naturally interpret and apply the supreme law of the Constitution when deciding what the ordinary law shall be. The only question addressed by the Chief Justice, then, is whether courts should also do so when deciding what the ordinary law is. In other words, the issue in *Marbury* may be characterized as whether courts, because of their role as expositors of the law, must also shoulder the obligation to consult constitutional authority when deciding what the ordinary law is (that being their

⁴¹ See Paine, Rights of Man, Part Two, *supra* note 2, at 574 (advocating all of these).

province and duty), no less than legislators must consult constitutional authority when deciding what the ordinary law shall be.⁴²

Let me sum it up this way: Marshall, at least in *Marbury*, explicitly endorses judicial review, but he is silent on the legitimacy of legislative review and the relation between the two, and it is likely that he did not see them in conflict. It is at least a possible reading of *Marbury* that Marshall decided that the courts must consult the Constitution when deciding what the ordinary law *is*—that being the special province of the judiciary—just as the legislator must consult the Constitution when deciding what the ordinary law shall be—that, after all, being the province of the legislator.⁴³ In *Rights of Man*, Paine is silent on judicial review, but quite explicitly endorses legislative review—if by “review” one means simply legislative consultation and interpretation of constitutional norms.⁴⁴ There is thus no reason to think he would have disapproved of the relatively narrow outcome in *Marbury*, although as I will show below, he could have done without the rhetorical dicta. The overlap is this: Neither Marshall nor Paine denies the legitimacy, necessity, coherence, or desirability of active, ongoing, legislative interpretation and application of constitutional norms. Neither denies the legitimacy of judicial interpretation, either. Marshall argues the necessity of the latter, while Paine goes at least some distance toward explicitly endorsing the desirability of the former. Neither, however, writes as though one precludes the other.

Nonetheless, a fundamental difference between the two conceptions of constitutional law and ordinary law does emerge from these roughly contemporaneous documents. Where Marshall's understanding of constitutionalism does depart, and radically, from Paine's, is in his insistence on the permanence, or at least the stability, of constitutional norms. Paine envisioned a constitution as a law governing the legislature, and therefore unchangeable by that

⁴² Marshall concludes with the telling observation that “the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.” *Marbury*, 5 U.S. (1 Cranch) at 179–80.

⁴³ Cf. Waldron, *supra* note 38, at 191 (reading Marshall as advocating only this co-equal power of judicial review: “Marshall is in fact arguing that their duties in respect to the Constitution are no less than the legislators’, not that they are inherently superior”) (emphasis omitted).

⁴⁴ Paine, *Rights of Man*, Part Two, *supra* note 2, at 574.

legislature,⁴⁵ but one that would be subject to constant popular, democratic revision. Future generations are no more bound to accept constitutional law, Paine argued, than an heir is bound to accept an inheritance.⁴⁶ It is a law that by its nature must be owned, endorsed, and valued by each generation affected by it in an active, participatory, and thoroughly political process.⁴⁷ Paine envisioned the constitution as a law, in short, that would flow *from* politics, even as it constrained politics.

Marshall, in contrast, endorsed a permanent, stable constitution, which, once made, could not and should not be altered. The contrast could not be more total. Listen to Marshall on the topic:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, *they are designed to be permanent.*⁴⁸

Here is the heart of the conflict between the Painean and Marshallian constitutions—not so much the question of institutional responsibility, but rather the more political question of constitutional stability. For Marshall, that the people “have an original right to establish, for their future government,”⁴⁹ constitutional principles governing their happiness, is the very cloth from which the fabric of American society is sewn. For Paine, it is not too strong to say that such a right, should it exist, would destroy the American fabric.⁵⁰ As demonstrated above, Paine fervently believed no generation has an obligation to accept the constitutional principles laid down by another, any more than an heir has an obligation to accept

⁴⁵ Id.

⁴⁶ Id. at 594–95.

⁴⁷ Id. at 578.

⁴⁸ *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added).

⁴⁹ Id.

⁵⁰ See Paine, Rights of Man, Part Two, *supra* note 2, at 594–95.

an inheritance laid down by an ancestor.⁵¹ For Marshall, the project of constitution-making is such a “great exertion” that it ought never be repeated;⁵² for Paine, however intense the exertion, it ought to be repeated indeed—occasionally, regularly, or, if need be, frequently.⁵³ For Marshall, these fundamental principles are to be permanent. For Paine, these principles are fundamental, but by no means permanent. For Marshall, the constitutional restraint imposed on Congress comes from a source entirely apart from the Congress thus constrained: an earlier, generative, and one-time constitutional moment when the limits on the powers of the law-maker were forever fixed. For Paine, the constitutional restraint imposed on Congress or state legislatures comes from the people of the same generation as the representatives themselves.

This distinction between the two men's understandings of the nature of constitutions—and, hence, of the nature of the fundamental law governing the governors—is profound. It is not simply the distinction between judicial review and legislative review of legislation. Paine's constitutional law, like Marshall's, was meant to constrain the government. The rabble-rousing democrat Paine⁵⁴ wanted legislation to come from an orderly constitutional process constrained by law, of which the Constitution was to be the source. Paine endorsed every expansion of the franchise suggested in his day and even added a few of his own reckoning.⁵⁵

Nonetheless, it does not follow that Paine idealized unrestrained rule by the mob. The constitution was to be a law for the governors; it was to bind their actions. His affection for constitutionalism, however, by no means stemmed from a distrust of politics, participatory democracy, the people (even a majority of them) or

⁵¹ *Id.* at 574.

⁵² *Marbury*, 5 U.S. (1 Cranch) at 176.

⁵³ Paine, *Rights of Man*, Part Two, *supra* note 2, at 574–75, 594–95.

⁵⁴ See generally Foner, *supra* note 10, at 107–44 (describing Paine's philosophical radicalism and egalitarianism, and his political activism in Philadelphia during the early 1770s).

⁵⁵ See Foner, *supra* note 10, at 142–44 (noting that Paine advocated the abolition of property ownership as a requirement for voting and advocating that the right to vote be “as universal as taxation”).

their representatives.⁵⁶ He viewed constitutional law as itself a product of the political process, but in a longer and deeper wave—a constitutionally creative moment followed in relatively quick order by legislation, which would in turn be constrained and directed by constitutional mandate. In this regard, Paine's constitution—one constituted anew through representative politics on a regular basis and which no particular generation is ever obligated to accept—is a far cry from the constitution (somewhat) expounded by Marshall in *Marbury*. Marshall advocated an unchanging constitution that constrains political outcomes by limiting the options of each generation by the presumed intergenerational consensus divined some time in the past. Like the particular American constitutions he thought came close to embodying it, Paine's constitutional ideal—lawful but populist, fundamental yet tentative—was in this regard the antithesis of the stable, intergenerational document described by Marshall.

It is important, however, to stress that Paine's constitution is not simply the rejected alternative in Marshall's formalistic dualism: an "ordinary legislative act[], and like other acts, . . . alterable when the legislature shall please to alter it."⁵⁷ That construction leaves out the conceptual space that Paine's three-pronged conception of populist constitutional law occupies: a body of law that does indeed constrain politics but that also emanates from politics and is ultimately enforced through politics. All three points are central to Paine's constitutionalism. First, Paine's constitution, no less than Marshall's, is a fundamental law governing the acts of governors, a constraint on, not an extension of, that government. It is no "ordinary legislative act."⁵⁸ This does not mean, however, that it is not a political or even legislative act; it is. What it is not is an *ordinary* legislative act. It is both legislative and extraordinary: produced by the people and their representatives in constitutional but entirely political legislative moments.⁵⁹ Second, precisely because it is a legislative act, albeit not an ordinary one, the constitution has to ema-

⁵⁶ On the contrary, Paine admired constitutions as much as he did precisely because they emanate directly from the people's will. Paine, Rights of Man, Part Two, *supra* note 2, at 572–75.

⁵⁷ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁵⁸ Paine, Rights of Man, Part One, *supra* note 2, at 467–68.

⁵⁹ Paine, Rights of Man, Part Two, *supra* note 2, at 574, 594–95.

nate repeatedly from the people, from every generation that accepts it.⁶⁰ Its original purpose, and its continuing function, is to tighten rather than loosen the bonds that tie lawmakers to the people on whose behalf they legislate. Its genesis was an attempt to establish the democratic power of the people, not to limit, check, disaggregate, separate, or counter it, and its continuing function ought to be the same. Third, it is to be enforced through legislative interpretation and action in accordance with its mandates.⁶¹ Legislators should regard the constitution as binding, referencing and employing it in legislative argument when deciding what the law shall be—just as, for Marshall, the courts must turn to it to decide what the law is. I will return to and expand upon this third point, which is the most consequential for modern purposes, below.

Let me conclude this Part by returning, briefly, to Paine's famous utterance. What did he mean by declaring that in America, law is king? I have argued that Paine did *not* mean that in America, law—or constitutional law, or the rule of law—limits politics, as the king might in a well-functioning monarchy. Instead, Paine meant that self-rule governs in America, in both the republican and democratic senses: The law to be accorded the respect given to monarchs in other locales is that produced by representative legislatures acting in the interest of all the people. The law that is king is not a law, constitutional or otherwise, that limits politics. Rather, it is the law produced through political processes in the interest and at the behest of the people affected by it.

Does this unqualified advocacy of pure, representative, majoritarian democracy give rise to contradiction, coming as it does from an ardent defender of rights, constitutions, and constitutional law? I think it does not, but seeing why requires us to put aside modern conceptions of both law and constitutions. "Law" did not necessarily mean in Paine's time "that which is applied by courts."⁶² Rather, law could be either extraordinary or ordinary, fundamental or legislative, directed to government or directed to courts. And while the province of the judiciary was to interpret and apply the latter,

⁶⁰ Id. at 594.

⁶¹ Id. at 574.

⁶² Of course, this is precisely the account Paine gave of ordinary law. Paine, *Rights of Man*, Part One, *supra* note 2, at 468.

the same was not true of the former. Therefore, constitutional law, for Paine, unlike ordinary law, could be “law” without being the sort of thing that requires judicial interpretation, application, or oversight. It could be law and nevertheless be directed at and interpreted and applied by legislatures—sometimes constraining and at other times mandating or guiding their course of action.

But in what sense, then, is constitutional law still “law”? What does it share with ordinary law, if not the quality of being “that which is applied by courts”? What makes constitutional law a species of law, in Paine’s view, was precisely that quality that makes law, unlike monarchs, worthy of respect: Like ordinary law, constitutional law emanates from politics (albeit in extraordinary rather than ordinary moments), reflects the will of the people it governs, and is directed at the preservation of their interests and the furtherance of their well-being. What constitutional law shares with ordinary law, in other words, is that both are the products of politics. Both are the results of representative democratic acts.

Here, the contrast of Paine’s views, not only with Marshall’s, but also with modern constitutional sensibilities, is near total. For the modernist, constitutional law shares with ordinary law the realist quality of being the subject of judicial application; constitutional law, like ordinary law, is that which courts apply, discover, and interpret. The widespread acceptance of this realist definition of law is, I think, the reason for the constant misreading of Marshall’s penultimate argument for judicial review, that it is the province of the courts to say what the law is. To the modern reader, including the mid-century Court in *Cooper v. Aaron*,⁶³ the word “law” in that sentence refers to the law of the Constitution, and because the Constitution is law, it must therefore be the Court’s role to say what it is.⁶⁴ Again, what constitutional law shares with ordinary law,

⁶³ 358 U.S. 1, 18 (1958).

⁶⁴ Professor John Harrison’s otherwise strong article reconstructing Marshall’s argument for judicial review suffers from this flaw, in my view. In Professor Harrison’s reconstruction, the text precludes congressional review because it is Congress’s role to make, not interpret, the “law,” and the courts’ claim to finality likewise follows from the Constitution’s status as law. John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 Va. L. Rev. 333, 367–68 (1998). For an argument that Marshall in fact held views closer to the Jeffersonian conception, including a rejection of judicial finality, an openness to the possibility of concurrent constitutional review and debate, and a limitation of final judicial review to specific cases rather than ques-

for the modern constitutionalist, is the quality of being that which courts apply when doing the work of saying what the law is. For Paine, however, the essence of law was more complex; the quality of being that which courts apply was the defining attribute merely of ordinary law, not of law *per se*.⁶⁵ Constitutional law, in contrast, was directed to government.⁶⁶ The essence of law common to both, then, was not that both are applied and hence interpreted by courts.

Rather, what constitutional law and ordinary law share is their genesis in representative, democratic politics. And precisely because the content of constitutional law was to be a product of politics as well as a limit upon it, reflective of the will of the living, not the dead, requiring democracy, not compromising or checking it, it deserves our respect and rightly commands our obedience. Due to the traits constitutional law shares with ordinary law—its republican ambition and its democratic origin—it is worth the revolution it took to win it. Because constitutional law, like all law, partakes of, is produced by, and is a part of politics, it is king in America.

II. THE PAINEIAN CONSTITUTION AND MODERN CONSTITUTIONALISM: ONE CONTRAST

Paine's populist-legal constitution has clearly been lost to us through time. In the case law that now constitutes our story of constitutionalism, we have embraced, first, the necessity of judicial review of the constitutionality of legislative action put forward by Marshall in *Marbury v. Madison*.⁶⁷ Second, we have adopted the practice of judicial supremacy of constitutional interpretation should the courts' reading of the Constitution conflict with that of other political actors, a practice forcefully asserted by the Warren Court more than a hundred years after *Marbury* in *Cooper v. Aaron*.⁶⁸ Finally, we have accepted the habit of judicial exclusivity, culminating in the modern argument found in Rehnquist Court de-

tions, see David E. Engdahl, John Marshall's "Jeffersonian" Concept of Judicial Review, 42 Duke L.J. 279 (1992).

⁶⁵ Paine, Rights of Man, Part One, *supra* note 2, at 467–68.

⁶⁶ *Id.*

⁶⁷ *Marbury*, 5 U.S. (1 Cranch) 137.

⁶⁸ 358 U.S. 1, 18 (1958).

cisions and elsewhere, that not only is judicial review necessary and necessarily authoritative in the event of conflict, but that judicial interpretation should be *exclusive*. This argument holds that no other branch, particularly Congress, has the power to venture and act upon its own interpretation of the Constitution.⁶⁹ Rather, it is apparently the Court's understanding that only the courts, as expositors of the law, can tell us the meaning of the Constitution.⁷⁰

⁶⁹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), where Justice Kennedy writes:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. [The Religious Freedom Restoration Act] was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Since *City of Boerne*, the Court has tightened its control over constitutional interpretive authority considerably, limiting Congress's § 5 powers under the Fourteenth Amendment, for example, to legislation consistent with both the Court's understanding of the meaning of that amendment and the Court's method of determining when states are in violation. That method of reasoning, interestingly, has its origins in an acknowledgement that the judiciary is comparatively ill-suited to factfinding. See Larry D. Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4, 145–52 (2001) (discussing modern cases limiting Congress's § 5 and Commerce Clause powers, particularly *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)). For an argument to the effect that only Congress lacks final interpretive authority of constitutional questions because it is Congress's power to make, not interpret, law, see Harrison, *supra* note 64, at 367–68.

⁷⁰ The two most important cases asserting the seeds of this exclusive authority, which at least one commentator calls the doctrine of “judicial sovereignty,” see, e.g., Kramer, *supra* note 69, at 14, will likely turn out to be *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court invalidated the Gun-Free School Zones Act, which had made it a federal offense to possess a firearm near a school, as violative of the “judicially enforceable outer limits” of congressional authority under the Commerce Clause, *id.* at 566, and *United States v. Morrison*, 529 U.S. 598 (2000), in which the Court struck down portions of the Violence Against Women Act because the evidence Congress had amassed showing an impact on interstate commerce was not sufficient. In *Morrison*, the Court held that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. . . . [W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this

Through this evolution of ideas, the constitution Paine thought he saw in the American example—a constitution for and to the *government*—has become a constitution for and to *courts*. Through this evolution, the popular-legalist constitution that was so clearly the object of Paine's praise and admiration has utterly disappeared. The contemporary practice of judicial review, by which courts deploy precedent, original meaning, fundamental values, or neutral principles so as to constrain state action and expand individual or corporate freedom, whatever its merits or demerits, is not even an echo of the revolutionary and democratic implications of Tom Paine's commonsensical utterances.

The loss of Tom Paine's Constitution is regrettable; it has cost us constitutional principles and practices that may have proven worthy. I will try to explain what those may be in the next Part of this Article. Before doing so, however, it is worth noting that the primary cost of the disappearance of Paine's envisioned constitution is simply logical: It has impaled us on the horns of an unappealing and false dilemma. That dilemma was famously described, and perhaps created, by Marshall in *Marbury v. Madison*, and our constitutional practices have been misguided by it ever since. Here is Marshall's account of our constitutional options:

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Court.” Id. at 614 (citations omitted). Here, Congress had failed to make such a showing because Congress had “rel[ie]d so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers.” Id. at 615. For forceful critiques of the Court’s preemptory constitutionalism in these cases and others, see Kramer, *supra* note 69; Victoria Nourse, *Toward a New Constitutional Anatomy* (Mar. 26, 2003) (unpublished manuscript, on file with the Virginia Law Review Association).

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.⁷¹

These alternatives seem, in retrospect, both undesirable and untenable. The option Marshall rejects—that legislative acts contrary to the Constitution and therefore not law might nevertheless oblige the courts to give them effect—has never been tried in the United States. The effect of Marshall's decision has been to eliminate this possible understanding of what it might mean to have a written constitution. It is hard to declare an untested program a failure. Furthermore, it may well be, as a number of contemporary constitutional scholars who doubt the wisdom of judicial review now regularly argue,⁷² that Marshall dismissed this possibility too quickly. Constitutions enforced, interpreted, and changed by ordinary legislative means may not be as utterly meaningless as Marshall supposes. Courts would have to enforce all laws passed by legislatures, but that would not necessarily render the Constitution meaningless; the possible unconstitutionality of a statute would remain as a matter for the political process to resolve. If a legislator persisted in voting for unconstitutional legislation, his constituents could simply vote him out of office, no less than if he persisted in voting for legislation widely viewed as unwise.

Nevertheless, Marshall's rejection of the possibility that courts should enforce unconstitutional laws accords with common sense and common experience and has met the test of time. For any friend of constitutionalism, constitutional law without any sort of judicial review whatsoever is hard to imagine, and it is so for the

⁷¹ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁷² See, e.g., Mark Tushnet, *supra* note 13, at 56 (arguing that "[t]he Supreme Court at its best is clearly a lot better than Congress at its worst[, b]ut Congress at its best is better than the Court at its worst" and citing examples of congressional constitutional interpretation that have proven more lasting and more ambitious than judicial constitutional interpretation); see also authorities cited *supra* note 13.

reason Marshall ultimately gave: It would impose on courts the unacceptable responsibility of simply ignoring the possible or perhaps irrefutable unconstitutionality of the law they are being asked to apply. The problem with constitutionalism *sans* judicial review may not be, as some of Marshall's more contentious arguments seem to suggest, that the Constitution would have no force in such a world; it could clearly still have force as a document of great political significance. The real problem with a constitutional world in which judges play no part is in the construction of the judicial role: It is hard to see how their work is to proceed if they cannot consider constitutional questions. Some sort of judicial review may or may not be essential to an understanding of the Constitution as a law of restraint, rather than a mere statement of political aspiration, but it is clearly essential to an understanding of courts as expositors of law. The first horn of Marshall's dilemma is as untenable as he suggested it to be.

But what of the second horn of the dilemma, Marshall's preferred alternative? Is it either tenable or desirable? Let us start with whether or not it is tenable. It seems clear that Marshall's formulation of a "constitution . . . [as] a superior, paramount law, unchangeable by ordinary means,"⁷³ has proven unsound in practice, regardless of whether we continue to pay it lip service in theory. We do not have a superior, paramount law, unchangeable by ordinary means. Rather, we have a body of constitutional law constraining the freedom of political actors that is completely changeable by ordinary *judicial* means; namely, our traditional, common law methods of reasoned, judicial elaboration of legally binding precedent. What is odd about our constitutional law when viewed as a body of common law is not that it is unchangeable. Indeed, it is no less changeable than the law of contracts or torts, and it may in fact be more changeable. There might be much to commend this common law body of constitutional law. Through such a practice, courts bind the populace to principles they deem fundamental, principles which might, after all, be very good. The principles on which *Brown v. Board of Education*⁷⁴ and *Roe v. Wade*⁷⁵ were de-

⁷³ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁷⁴ 347 U.S. 483 (1954).

⁷⁵ 410 U.S. 113 (1973).

cided seem like very good principles, and the bad principles on which the bad cases—*Dred Scott v. Sandford*,⁷⁶ *Plessy v. Ferguson*,⁷⁷ *Lochner v. New York*⁷⁸—were decided are luckily principles current judges disavow. We may have lucked out: The principles undergirding this nondemocratic and antipolitical body of law and dictating the terms of our democracy and our politics are, right now at least, basically good and decent. Further, the practice of constitutional common law might go some way toward ensuring that formal equality is accorded to litigants. Rules of precedent, stare decisis, and the like, which govern judge-made law, are necessary to ensure that like cases are treated alike in a way that both maintains the integrity of law and accords with common understandings of justice. Lastly, the practice of fidelity to precedent and an evolutionary rather than convulsive approach to constitutional adjudication helps to ensure that the Court continues to garner the respect necessary to assure some degree of voluntary compliance with its decisions by citizens and officials.

Thus, our method of constitutional common law seems to have given us some benefits: some good principles of governance, some measure of formal equality for litigants, and a Court that has earned the respect it needs for its judgments to be enforced. The one thing our entrenched practice of common law constitutionalism clearly does not do, however, is protect or enforce what Marshall thought he saw in the Constitution: an act of an “original and supreme will” expressed in one great exertion, rarely to be repeated, laying down fundamental principles designed to be permanent.⁷⁹ The evolving constitution presumed by our entrenched practice of common law constitutionalism is as far removed from the one produced by Marshall’s metaphoric original and supreme will, both binding and determining the future, as it is from Paine’s metaphoric testamentary bequest, obliging no particular recipient and accepted by its beneficiaries only to whatever degree they might find acceptable.⁸⁰

⁷⁶ 60 U.S. (19 How.) 393 (1856).

⁷⁷ 163 U.S. 537 (1896).

⁷⁸ 198 U.S. 45 (1905).

⁷⁹ *Marbury*, 5 U.S. (1 Cranch) at 176–77.

⁸⁰ No case makes this clearer than *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Justice O’Connor’s famous dictum in that decision (“Liberty finds no refuge in

Would Marshall's constitutional "Big Bang" be *desirable*, however, even if it were a tenable account of our constitutional practices? Very little said in *Marbury* itself commends it. In *Marbury*, the principle of government underlying Marshall's preference for a "permanent" body of constitutional law, "unchangeable by ordinary means,"⁸¹ is that "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."⁸² Further, "[t]he principles, therefore, so established" are consequently "designed to be permanent."⁸³ The people, then, have an "original right" to establish permanent principles that in their view will most conduce to happiness. But this argument is pretty flimsy. If Marshall's point had been that the people have a right to establish, for their own future government, principles for their own happiness, the argument would have been unassailable, so long as it makes sense to think that our considered, long-term constitutional judgments might be an improvement over our short-term political decisions (just as some suggest that our short-term political decisions might be an improvement over our short-term consumption choices⁸⁴). But the idea that the people of one era have an "original right" to decide principles that they believe will most conduce to the happiness of

a jurisprudence of doubt."), *id.* at 844, and her holding rested squarely upon the Court's need to maintain consistency with the precedential constitutional past, not with the "original and supreme will." *Id.* at 854-55. She framed the issue in *Casey* as whether the Court should breach expectations secured by *Roe v. Wade*, 410 U.S. 113 (1973), not as whether the Court should breach the "original and supreme will." *Casey*, 505 U.S. at 854-61. O'Connor held that the Court should not violate the rights secured by *Roe* for the same reasons that courts adhere to *stare decisis* generally: the need for consistency in adjudication and the dependence of decisional liberty on predictable judicial pronouncements. The result is not allegiance to an unchanging constitutional generative moment, but allegiance to recent case law, which cannot be changed through legislative means.

The *Washington Post* reported that the controversial Miguel Estrada, when testifying in front of Congress for confirmation to the United States Court of Appeals for the District of Columbia Circuit, repeatedly asserted his willingness to "follow precedent" and to apply *Roe v. Wade* because *Roe* "is the law." Benjamin Wittes, *Silence Is Honorable*, *Wash. Post*, Feb. 25, 2003, at A23. The law, in other words, is Supreme Court precedent, not the Constitution itself.

⁸¹ *Marbury*, 5 U.S. (1 Cranch) at 177.

⁸² *Id.* at 176.

⁸³ *Id.*

⁸⁴ See, e.g., Mark Sagoff, *We Have Met the Enemy and He Is Us or Conflict and Contradiction in Environmental Law*, 12 *Env'tl. L.* 283, 284-86 (1982).

future generations, and that that right is the foundation on which "the whole American fabric has been erected," is quite dubious.⁸⁵ How could there possibly be, in a democracy, an "original right" in one generation to decide fundamental principles of governance for future citizens? What would be the source of this original right? Or does the adjective "original" mean that it has no origin but is the source of all other rights? But if it has no origin, what is the argument for its existence? And if it has no origin, and if it is truly a right to lay down principles governing the happiness of future generations that have no political control over them, how is that right any different from the "original right" of monarchs to do likewise?

Tom Paine, whatever his unstated views on judicial review, was an unequivocal critic of what might be called Marshall's "permanent constitutionalism." Throughout his involvement with the ideas and practices of constitutionalism, Paine consistently criticized the view, as central to Marshall's conception as judicial review itself, that constitutions must be unchanging and their principles permanent. In part, and as discussed above, Paine's objection was simply that a too firmly entrenched constitution would never benefit from the wisdom of accumulated experiences.⁸⁶ But he also had a more specific objection. The particular constitutions of the late eighteenth century, in his view, represented great advances in human understanding, but they also came at an historical moment that retained the "barbarism" of earlier, pre-democratic, and pre-constitutional understandings of political life.⁸⁷ To freeze constitutionalism, he feared, would freeze these barbaric understandings.

⁸⁵ *Marbury*, 5 U.S. (1 Cranch) at 176.

⁸⁶ Paine, *Rights of Man*, Part Two, *supra* note 2, at 574, 594–95. Paine also viewed permanent constitutionalism as of a piece with Burkean political theory and objectionable for that reason alone. In *Rights of Man*, Part Two he explicitly joined the two:

One of the greatest improvements that has been made for the perpetual security and progress of constitutional liberty, is the provision which the new constitutions make for occasionally revising, altering, and amending them.

The principle upon which Mr. Burke formed his political creed, that "of binding and controuling [sic] posterity to the end of time, and of renouncing and abdicating the rights of all posterity for ever," is now become too detestable to be made a subject of debate; and, therefore, I pass it over with no other notice than exposing it.

Id. at 594.

⁸⁷ Paine, *Rights of Man*, Part Two, *supra* note 2, at 595.

This passage from *Rights of Man, Part Two*, pointing toward a future when constitutionalism itself might embrace a cosmopolitan and universalist, rather than a nationalist and particularist, understanding of rights is typical:

The best constitution that could now be devised, consistent with the condition of the present moment, may be far short of that excellence which a few years may afford. There is a morning of reason rising upon man on the subject of government, that has not appeared before. As the barbarism of the present old governments expires, the moral condition of nations with respect to each other will be changed. Man will not be brought up with the savage idea of considering his species as his enemy, because the accident of birth gave the individuals existence in countries distinguished by different names; and as constitutions have always some relation to external as well as to domestic circumstances, the means of benefiting by every change, foreign or domestic, should be a part of every constitution.

....

Government ought to be as much open to improvement as any thing which appertains to man, instead of which it has been monopolized from age to age, by the most ignorant and vicious of the human race.⁸⁸

Let me look now at two possible understandings of constitutionalism that Marshall's dualism elides (there may well be others). First is the constitutional practice we have in fact embraced, a practice as distant from Marshall's insistence on the "original and supreme will" as the system of intentional judicial abdication he explicitly rejects. This practice views the Constitution as a body of common law, which, like all common law, is changeable by ordinary judicial measures, but which, unlike other common law, is not changeable by legislative means. How should we evaluate our current practices? Although widely accepted as constitutional dogma, from a contemporary, common law perspective, this constitutional practice—the judicial development of a body of common law, insu-

⁸⁸ Id.

lated against legislative intervention and correction—is odd. Outside of the context of constitutional law, we typically think of judge-made law as democratically acceptable precisely because it is interstitial and always subject to legislative correction. Without the potential for legislative intervention, we have, essentially, government by precedent rather than government by law. That is true whether by “law” one means the law as produced by legislators in ordinary political processes or the extraordinary law as produced by the “original and supreme will.”

And what of “government by precedent?” Some of its benefits were recited above: evolutionary as opposed to revolutionary change, the guarantee of equal justice to litigants, and the securing of decent principles of good governance. For an inventory of the costs, however, let me return to Paine. Government by precedent, Paine urged, puts precedent before principle, instills a lazy disregard for current and future necessity, reveals a dangerous lack of genuine and legitimate law, operates to shield privilege and wealth, elevates a superstitious regard for the past, and is in practice no better than, or even all that different from, monarchic arrogance, whimsy, and unaccountability.⁸⁹ It is, he thought, one of the “vilest systems that can be set up”⁹⁰—a severe criticism considering his contempt for monarchy—and he argued that respect for precedent would soon be a thing of the past, like the monk’s heightened regard for “ancient relics.”⁹¹ Ironically, given the way things turned out, Paine believed this would occur because “government by precedent,” no less than monarchy, was threatened by the renewed vigor given democracy by the American revolution.⁹² Indeed, because precedent has none of the legitimacy or critical reflection or intelligence of democratically derived legislation, Paine contrasted it with “true law.”⁹³ Precedent was everything law was not; it quite clearly was not that which should be king in America. Consider the following passage from the *Rights of Man, Part Two*:

⁸⁹ Id. at 583–84.

⁹⁰ Id. at 583.

⁹¹ Id.

⁹² Id.

⁹³ Id. at 584.

Almost every case now must be determined by some precedent, be that precedent good or bad, or whether it properly applies or not; and the practice is become so general, as to suggest a suspicion, that it proceeds from a deeper policy than at first sight appears.

Since the revolution of America, . . . this preaching up the doctrine of precedents, drawn from times and circumstances antecedent to those events, has been the studied practice of the English government. The generality of those precedents are founded on principles and opinions, the reverse of what they ought; and the greater distance of time they are drawn from, the more they are to be suspected. But by associating those precedents with a superstitious reverence for ancient things, as monks shew [sic] relics and call them holy, the generality of mankind are deceived into the design. Governments now act as if they were afraid to awaken a single reflection in man. They are softly leading him to the sepulchre of precedents, to deaden his faculties and call his attention from the scene of revolutions. They feel that he is arriving at knowledge faster than they wish, and their policy of precedents is the barometer of their fears. This political popery, like the ecclesiastical popery of old, has had its day, and is hastening to its exit. The ragged relic and the antiquated precedent, the monk and the monarch, will moulder together.

Government by precedent, without any regard to the principle of the precedent, is one of the vilest systems that can be set up. In numerous instances, the precedent ought to operate as a warning, and not as an example, and requires to be shunned instead of imitated; but instead of this, precedents are taken in the lump, and put at once for constitution and for law.

Either the doctrine of precedents is policy to keep man in a state of ignorance, or it is a practical confession that wisdom degenerates in governments as governments increase in age, and can only hobble along by the stilts and crutches of precedents. How is it that the same persons who would proudly be thought wiser than their predecessors, appear at the same time only as the ghosts of departed wisdom? How strangely is antiquity

treated! To answer some purposes it is spoken of as the times of darkness and ignorance, and to answer others, it is put for the light of the world.⁹⁴

Yet another possibility elided by Marshall's articulation of our constitutional dilemma is the vision of constitutionalism advocated by Paine himself: a constitution that operates as the "law for government," not only because it operates as a limit on government, but also because, like all law, it emanates from politics—that is, in a regular process from the people and their representatives to assure that it represents the "original and supreme will" of the people whose rights it is designed to protect. A constitution, according to both Paine and Marshall, must operate as a meaningful constraint on legislators. Paine, Marshall, and modern constitutionalists also believed that a constitution must be *law*. But Paine's view of law's essence was different from that of Marshall and modern commentators. For Paine, a constitution, precisely because it is law, must be the product of democratic processes and aimed at the common good. Such a constitution would be consulted, and necessarily interpreted, by legislators when they are determining what the law shall be, no less than it is consulted by judges in the process of spelling out what the law is. Under Paine's formulation, legislators have an obligation to ask what the constitution requires and forbids. A particular legislator's interpretation of what the constitution requires would then be subject to a political as well as a judicial check. And Paine's ideal constitution—located in real time and produced by real people, not the product of an original and supreme anything—would always be subject to democratic revision. The constitution, so understood, would operate as a law for government, but one that is itself the product of politics, rather than a restraint upon it. Like all law, this constitution would be respected precisely for its democratic origins and republican ambition.

III. OUR LOST POPULAR CONSTITUTION

What are the costs of the disappearance from contemporary judicial consciousness of the populist-legal constitution that Paine seemingly envisioned? Although perhaps analytically trivial, the

⁹⁴ Id. at 583–84.

most obvious cost is the loss of any collective memory of that document as being constructive and constitutive of, and therefore a proper subject of, representative democracy and republican aspiration. Instead, we have come to think of the Constitution as being constructive and constitutive of limits on representative democracy in the name of anti-republican individual rights. The Constitution, read literally and article by article, is, of course, largely about the structures of representative democracy.⁹⁵ Its authors and audience are the "People." It contains mechanisms for its own amendment.⁹⁶ It sets the terms of representative politics.⁹⁷ Unlike the world Paine envisioned, however, in the constitutional world we inhabit the terms of government the Constitution establishes are not themselves the subject of politics—representative, populist, democratic, republican, or otherwise. The mandates that set the terms of democracy are not themselves democratic choices, and we do not experience them as such. There is no popular sense of those "constitutional moments" noted in retrospect by constitutional historians,⁹⁸ regardless of whether the workings and machinations of presidents, Supreme Court justices, and generals eventually reveal us to have experienced one.⁹⁹ We do not live the waves of democracy envisioned by Paine: regular, popular revisitings of constitutionalism followed by periods of ordinary lawmaking under a constitution willed by the people. This chasm in our democratic politics—the absence of constitutionalism as a subject of democ-

⁹⁵ For a full and important interpretation of the Constitution's structures that puts representation and relation at the center of the constitutional project rather than at the periphery, see Nourse, *supra* note 70.

⁹⁶ U.S. Const. art. V.

⁹⁷ *Id.* art. I, §§ 2–5; *id.* art. II, § 1; *id.* amends. XII, XIV, § 2, XV, XVII, XIX, XXII, XXIII, XXIV, XXVI.

⁹⁸ See, e.g., Bruce Ackerman, *We the People: Transformations* 40–41 (1998).

⁹⁹ If "constitutional moment" means a time when constitutional distributions of power are fundamentally altered, we are likely living in one now. The power to declare war has been shifted away from Congress, where it resides under the Article I, Section 8, clause 11; authority to enforce the Fourteenth Amendment has shifted from Congress, where it resides under Section Five of that amendment, to the Court; and the power to interpret the Constitution has shifted from all political actors to the Court. Yet, if "constitutional moment" means a time of heightened awareness of deeply political governance issues, we clearly are not living in such a moment. Perhaps, oxymoronically, we are sleepwalking through a constitutional moment. Maybe that state of affairs itself qualifies as a constitutional moment: Constitutional governance undergoes significant transformation with little popular awareness of the change.

racy—is such a part of the white noise of American political life that for the most part we do not notice it. We do indeed have occasional convulsive moments of constitutional recrafting, such as the era that produced the Reconstruction Amendments, and we have experienced fringe movements, such as today’s thankfully dwindling militia movements, that take seriously the idea of constitutionalism as something that ought to be the subject of politics.¹⁰⁰ Otherwise, there is no consciousness of constitutionalism as something that can and should be the subject of regular democratic change, nor is there agitation for the creation of mechanisms that would make such change a reality. And there is no sense that any of this is problematic.

Nevertheless, it is problematic. The problem is not simply that by virtue of judicial review the perennial subjects of judicial review have been taken off the political table—the constitutionality of prohibitions on abortion, for example, or gun control, or patterns of racial segregation, or affirmative action, or open trials for suspected terrorists, and so on. The problem is that the terms of constitutionalism, and hence the terms of democracy, have disappeared as subjects of politics. Why is there not, for example, an urban-based movement to eradicate the heightened representation of sparsely populated parts of the country occasioned by our bicameral system of unequal representation? Why do “We the People” silently tolerate the electoral college a scant two years after an election that gave us a vote-loser as president? Why is there not a movement afoot to use the amendment process to secure in the constitutional text meaningful campaign finance regulation? Why are only a handful of prominent constitutional scholars interested in the problem of the structurally disproportionate representation of groups once called “suspect classifications,”¹⁰¹ while scores of scholars are interested in the possibility of protecting those groups through the even more grotesquely disproportionate judicial

¹⁰⁰ Leanora Minai, Hickory Farms manager led double life, authorities say, *St. Petersburg Times*, Dec. 10, 1999, at 1B.

¹⁰¹ That handful now includes Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *Fordham L. Rev.* 2007 (2001); Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 *Loy. U. Chi. L.J.* 23 (2002); and Nourse, *supra* note 70.

branch?¹⁰² Constitutional clauses that do not touch directly on the terms of representative democracy might likewise be viewed as the subject of, rather than the limit on, democratic discourse. Why is there not a movement simply to repeal the Second Amendment if it is true, as seems likely, that gun culture interferes with political participation?¹⁰³ We consider amendments to render criminal the burning of the American flag; why are we not also considering amendments to protect reproductive choice¹⁰⁴ or reverse *Washington v. Davis*,¹⁰⁵ and *Bowers v. Hardwick*,¹⁰⁶ all of which might make the exercises of democracy more meaningful to huge numbers of citizens? Why do so many liberal constitutional theorists persist in thinking that an affliction dubbed "Amendmentitis,"¹⁰⁷ not the ab-

¹⁰² This scholarship has its roots in footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), suggesting the need for heightened scrutiny of legislation affecting discrete and insular minorities, which might not be able to influence the legislative process to a degree commensurate with their numbers. The scholarly literature on constitutional review as a means of protecting minorities is too vast to cite, but perhaps the strongest, as well as the most consistent and influential, such theory is the representation-reinforcement model set forth by John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 87-104 (1980).

¹⁰³ Representative Major Owens (D-N.Y.) authored a repeal of the amendment, but his proposal has not gone further. See Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. Rev. 57, 111-12 (1995).

¹⁰⁴ This is mentioned in passing by Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 Harv. C.R.-C.L. L. Rev. 407, 462 n.247 (1992).

¹⁰⁵ 426 U.S. 229 (1976) (holding that a facially neutral statute was not applied so as to invidiously discriminate against police recruits on basis of race). A constitutional amendment reversing *Davis* in effect would require Congress to consider the disproportionate and adverse impact on racial minorities of facially race-neutral legislation. This could in turn lead to a substantial advance in racial equality.

¹⁰⁶ 478 U.S. 186, 190-91 (1986) (upholding constitutionality of a state statute criminalizing sodomy because the Due Process Clause of the Fourteenth Amendment was not deemed to create a fundamental right to engage in consensual homosexual sodomy even in a private home). During the editing of this Article, *Bowers* was overruled in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Whether this judicial act turns out to be the beginning of a new civil rights era or a pyrrhic victory prompting a backlash against "judicial activism" and same-sex marriage is very much an open question. A popular constitutional approach, although politically difficult, if won, would not have carried the risk of popular backlash.

¹⁰⁷ The word is Dean Kathleen Sullivan's, by which she refers to an unhealthy desire to amend the Constitution. Kathleen M. Sullivan, *Constitutional Amendmentitis*, Am. Prospect, Fall 1995, at 20. For a critique of Professor Sullivan's argument, and a cri-

sence of serious political discussion of the constitutional terms of our democracy, is crippling contemporary America?

Second, the loss of a Painean populist-legal constitution has fostered a lack of appreciation for the character and virtue of what I will call the constitutional legislator—the legislator whose understanding of the political work of legislating is structured, constrained, and guided by his understanding of law and the Constitution. The absence of such a legislator from our contemporary constitutional consciousness is all the more striking given our heightened consciousness of his judicial counterpart, the politically minded judge. From the time of the realists through the advent and departure of the critical legal studies movement, we have become accustomed to the “legislative judge”: the judge whose understanding of adjudication is structured by his or her sense of politics, public policy, or, more loosely, the quasi-legislative consequences of judicial decisionmaking. It has become a truism since Justice Holmes first elaborated on the point¹⁰⁸ that the judge must be influenced by, and exerts substantial influence upon, “public policy” and engages in “quasi-legislative” reasoning; this follows inexorably, we now reason, from the impossibility of maintaining any firm distinction between law and politics. Oddly, however, the seepage between law and politics has been a decidedly one-way street. We have not developed a sense of, much less an appreciation for, the theoretical and actual *legal* constraints on politics and legislatures to parallel our appreciation for both the theoretical and real political constraints on law and judges. That is, while we now accept that judges ought to pay some mind to public policy when adjudicating, we have lost any sense, or indeed never developed any sense, of what it means for a legislator to heed the dictates or demands of law when legislating.

This loss may not initially appear to be substantial, particularly if we take seriously, as I have suggested we should, Paine’s anti-Burkean, anti-common law broadsides. Is it not enough that our judges are overly beholden to the past? All things considered, is it

tique of the liberal fear of populist constitutional law generally, see Tushnet, *supra* note 13, at 175–81.

¹⁰⁸ Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 465–66 (1897) (address at the dedication of a new hall at Boston University School of Law on Jan. 8, 1897), *reprinted in* 110 Harv. L. Rev. 991, 997–98 (1997).

not an unqualifiedly good thing that legislators are committed to the present and the future, attentive to the consequences of decisionmaking and attuned to a vision of the community to be made through law, rather than to a memory of the past community bequeathed us by law? Should not politics and legislation—the work of *making* law—be centrally about change rather than preservation of tradition, including the traditions of law?

This distribution of constitutional responsibilities sounds fine, but only if we steadfastly ignore what we insist upon in other contexts: the moral and political dimension of our constitutional law. If we acknowledge, as we must, the moralistic, principled, and political content of our legalistic constitution, and then put our morally rich constitution on the side of law in a “politics” and “law” divide, it should be clear that profound social costs stem from the insistence that legislators owe no duty of fidelity to law, particularly constitutional law, when legislating to change the course of our collective future. The “morality” that has become such a prominent component of our constitutional law is not ordinary morality; it is political morality. Consequently our legalistic constitution, much more than law generally, has become the repository of our most morally mature and morally enriched political dialogue. To read any major Supreme Court case of the last fifty years construing the Constitution is to realize that that body of common law, unlike other bodies of common law, is the recordation of our somewhat mythical and historical, and always idealized, communal self-narrative. It is a legal constitution—a set of positive norms imposed by courts on recalcitrant legislators—but it is also the moral story of the nation’s legal and political history. It is where our best politics, understood as the endeavor to rule in a morally defensible manner, reside.

As our legal constitution increasingly becomes the sole province of judges, lawyers, litigants, and commentators, those actors become our true politicians. They are our moral historians, the authors of the political and moral narrative about who we are and who we should be. At the same time, as we continue to embrace the claim that constitutional dialogue is the sole province of the judiciary—because it is, after all, law, not politics—our representative politics, and our representative political realm, become less political if we understand politics as the domain of moral governance.

In other words, if we identify the Constitution as the locus of our highest politics, and the courts as the proper expositors of constitutional values, our true political dialogue takes place only in courts. Legislatures, by contrast, become the province of interest group bartering, not politics.

Several examples illustrate this point. Surely, whether states ought to be allowed to criminalize abortion is a political question, just as whether abortions are ever morally justifiable or sometimes morally obligatory are moral questions. But because that question is also a constitutional—and hence legal—question, the Court has taken it up, vigorously and not always excellently. Once it is identified as a legal question committed exclusively to federal courts, the question—whether states ought to be allowed to criminalize abortion—is removed from public discourse. Political questions with any moral dimension whatsoever are identified as constitutional questions and accordingly become questions exclusively within the province of the federal judiciary.

Whether a state must criminalize, police against, and prosecute domestic violence likewise sounds like a political question. Do states owe citizens this protection, or do they not? Should the state permit family members to subject each other to rule by force? But, if those questions are also constitutional questions—whether it is a violation of the Fourteenth Amendment for a state to fail to criminalize domestic violence, and if so, whether it is within Congress's power and duty under Section Five of that amendment to do something about it—then these political questions become something that only courts, not legislators or the public, may answer. To put this more formally, if the Court is the arbiter of "law," the Constitution is a part of "law," and political morality is a part of the Constitution—all relatively unassailable premises—then the Court becomes not only the moral arbiter of our law but also the *only* moral arbiter of our law and, therefore, the only truly political branch of government. Morally enriched political discourse becomes the prerogative of no one but judges and justices, their twenty-five-year-old clerks, a few constitutional lawyers, and a few commentators for the *New York Times*. So the great and relatively unremarked-upon cost of our having deconstitutionalized the legislative task is that the political branch has lost its political identity because the Court has usurped it.

Lost opportunities are another consequence. The constitutional legislator who felt legally bound to consult the Constitution in legislating would be required to think like a lawyer as well as a legislator. This ideal—a “legislative lawyer”—carries obvious costs, combining as it does the potential vices of two decidedly unpopular professions. Ideally, however, and in practice, the constitutional legislator might absorb some of the virtues (not only the vices) that accompany a lawyerly mode of being. Being a lawyer virtually by definition requires an attentiveness and loyalty to certain legal virtues. The “constitutional legislator”—or, in the reverse, the “legislative constitutional lawyer,” should it come to be recognized as a mode of lawyering no less than one of legislating—might generate meanings of those legalistic virtues that could inform the legislative rather than the adjudicative arena. Indeed, those virtues might be worthy ones indeed.

An example that I have elaborated elsewhere might aid in understanding this distinction.¹⁰⁹ Although subject to a range of possible interpretations, a respect for “formal equality”—the insistence that like cases must be treated alike—is now typically understood within the adjudicative context as resting on one or both of two moral foundations. First is the liberal or libertarian intuition that, by deciding cases in this way, courts maximize individual freedom by rendering the law more certain. The second foundation is the conservative intuition that, by deciding cases in this way, the courts actively preserve the community’s legal traditions by maintaining continuity with past rules and institutions.

But the ideal of formal justice, or formal equality, need not only rest on those foundations. The universally-felt pull of legal justice—the insistence that like cases be treated alike and that like groups be treated alike—might also rest on the humanistic and communitarian moral intuition that human beings are inherently equal. Treating likes alike, in other words, might be a mandate not only to render the law certain and to preserve tradition, but also to accord to all human beings the dignity and respect owed them by virtue of their humanity. Understood in this way, the mandate of formal justice might rest on neither libertarian nor traditionalist

¹⁰⁹ See Robin West, *Is the Rule of Law Cosmopolitan?*, 19 *Quinnipiac L. Rev.* 259 (2000).

impulses. Instead, its basis may be the cosmopolitan and universalist conviction that because we share a common humanity, we are entitled to equal dignity and respect from those who hold lawful authority over us. This “cosmopolitan” interpretation of the idea of formal justice clearly gives that mandate meaning in the legislative, no less than the adjudicative, arena. It commits the representative, like the judge, to the project of equal treatment of all persons on the grounds that the quality of humanity necessitates such treatment. It accordingly expands the universe of those entitled to equal treatment by legislative acts and adjudicated decisions to the community of all persons—not just the “community” of litigants situated comparably to past litigants raising similar claims.

The most serious cost of the disappearance of the populist constitution trumpeted by Paine, however, is that we have lost all sense of what is required by what might be called our “affirmative constitution”: those parts of our Constitution that require the state to take certain action. We have become accustomed to thinking of our Constitution as one that forbids the state from doing many things but requires of it almost nothing. Paine’s constitution, which is directed to government, invoked by legislators debating the merits of proposed ordinary law, and turned to by legislators when deciding what shall be the law, embraces the possibility of affirmative constitutional necessity—“thou shalt”—as well as of constitutional restraint—“thou shalt not.” The legislator, in deciding what is to be the law, might examine the Constitution not only to discover what is forbidden, but also what is required; to ascertain what he must do, as well as what he must refrain from doing. A court, limited to the work of striking state actions that violate constitutional norms, will never have occasion to address constitutional lapses of affirmative duty.¹¹⁰

A number of interrelated casualties have resulted from this death of the affirmative constitution. Two are worth mentioning. First, as a consequence of this loss, the very state action that might address the most unjust conditions in what we today call the private realm, but which we might once have called the “state of na-

¹¹⁰ The point was first noted by Professor Lawrence G. Sager in his influential article *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1263–64 (1978).

ture,” seems lacking not only in urgency, but also in constitutional legitimacy.¹¹¹ We have lost a sense of the Constitution, and the *raison d'être* of the state, and the essence of law as responding to the problem posed by the maldistribution and misuse of private power. We have accordingly lost all sense of the demands of *justice*—not just charity—for state intervention into those spheres of private exploitation. As a result, we have misread a vital part of the message of classical liberalism: the Hobbesian understanding of law and the rule of law as that which deters, punishes, and controls private violence and violation. Rather, we increasingly view the constructed, public state, rather than the private state of nature, as that which needs to be constrained through the processes of law. This loss results in part from our commitment to a constitution that is understood to be “law” and read as relentlessly limiting state power and state action, rather than, as the text surely supports, a constitution that at times limits the power of states, and at other times requires that they act in response to private injustice, private oppression, and private violence.

Second, we have lost our sense of the political state, and of ourselves as political actors, as entities with a human potential for nobility rather than debasement. This loss, too, is attributable in part to our insistence on reading our own Constitution as expressive of nothing but an urge to limit, separate, counter, and compromise, rather than as a document facilitating, inspiring, or demanding political action. We have, in short, identified our Constitution as law, defined law as uncompromisingly opposed to politics and the state, and then identified our Constitution, rather than our politics, as expressive of our political morality. The result is syllogistic: Our political morality, such as it is, envisions politics as the problem rather than the solution; we view the products of representative democracy as driven by irrational and whimsical inclinations that

¹¹¹ Thus, almost no one argues today that a state is constitutionally required to address the welfare of citizens through affirmative actions, although it was not always so. See, e.g., Frank I. Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. Pa. L. Rev. 962 (1973). The *Lochner* era, of course, infamously stood for the proposition that the Constitution positively forbade the state from doing so, as such measures required interference with the private realms of contract and property. See Mark Tushnet & Gary Peller, State Action and a New Birth of Freedom, 92 Geo. L.J. (forthcoming 2004).

must be banished or rationalized through the reasoned, albeit punitive, manipulations of oedipal law.

The most striking cost of our neglect of the affirmative constitution, however, is the impact on the content of our rights. America lacks a tradition of constitutionally required, positive rights guaranteeing some minimal level of safety, well-being, and welfare to citizens. American constitutional lawyers, judges, and theorists committed both to constitutionalism and to welfare have been strikingly incapable of making out a case for the constitutional necessity of legal regimes that protect the safety, much less the well-being, of citizens.¹¹² The reasons for this failure are too many to catalog here, but one might be our widely shared understanding of our Constitution as a catalog of rights enforced by nonpolitical courts against the political branches. Because that is what the Constitution *is*, its substantive content must lend itself to that arrangement, and the substantive content of our negative rights fits that conception like a hand in a glove. Negative rights tell the government what it cannot do, and the Constitution generally consists of “thou shalt nots” imposed by courts upon legislatures. By contrast, positive welfare or security rights are by definition the sorts of rights that could only be given content by legislative, rather than adjudicative, action. They tell the legislature what it must do, not what it may not do. Our judicially enforced, restraining Constitution and our exclusively negative rights tradition are not traditions that have simply grown up side by side. They are, rather, two sides of the same coin.

To complete the metaphor, the “coin” of which negative rights and negative constitutionalism are two sides is, simply, law. Law, it

¹¹² Although there is now a substantial scholarship on the lack of positive welfare rights in our constitutional jurisprudence, there are very few attempts to actually describe the possible contours of such rights and their possible textual justification. For critiques of the state action doctrine, typically understood as foreclosing the existence of such rights, see Tushnet & Peller, *supra* note 111. For a critique of the presumed “negativity” of the American rights tradition, which also undercuts development of welfare rights, see Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271 (1990); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 Duke L.J. 507 (1991). For attempts to delineate the possible textual bases of positive welfare rights, see Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969); Michelman, *supra* note 111; Robin West, *Rights, Capabilities, and the Good Society*, 69 Fordham L. Rev. 1901 (2001).

is more or less agreed, is by definition that which courts enforce.¹¹³ Law—in its loftiest incarnations—is also that which restrains and constrains politics. The Constitution, being law, is enforced by courts and restrains and constrains politics on moral grounds. Rights, being a part of law and of constitutional law, then, must be legal constraints, morally grounded and enforced by nonpolitical courts against political actors. This modern understanding leaves no room for affirmative rights, whether understood as rights to welfare, jobs, labor, personal security, or other basic necessities. Affirmative rights would tell legislators what they must do, as a matter of law and of constitutional duty. At root, our understanding of law as that which courts enforce and which restrains politics has dictated our understanding of the content of our Constitution and the meaning of the rights it indisputably contains.

Thus, it is no mere coincidence that Tom Paine, who held a fundamentally different jurisprudential conception of law's essence and a fundamentally different political conception of constitutions than do we, also held a sharply contrasting conception of the nature of the rights of man for which he so fervently campaigned. Nor is it a coincidence that Paine's constitutionalism, unlike Marshall's and our own, lends itself readily to the promotion and protection of the positive rights of man. As noted above, "law," as Paine considered it, is not "that which courts enforce," although ordinary law, created by legislatures, is directed to courts for its enforcement.¹¹⁴ And the constitution, although "law," is "directed to" the government, to be applied by the government, and to be changed in regular processes by the people.¹¹⁵ The identification of the constitution as "law" thus does not necessarily imply judicial enforcement, exclusive or otherwise, and it does not imply a body of norms to be applied by courts. It most certainly does not mean that courts are to operate as a moral check on politics. Rather, the iden-

¹¹³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The realists magnified even further the role of courts, arguing that the law is that which the courts produce, and that rules of law are those that courts apply. See John Chipman Gray, *The Nature and Sources of the Law* 113–25 (Roland Gray ed., Macmillan Co. 1931) (1909).

¹¹⁴ Paine, *Rights of Man*, Part One, *supra* note 2, at 468.

¹¹⁵ See *supra* notes 17–28 and accompanying text.

tification of the constitution as “law” implies and restates its democratic origin and republican aspirations. The constitution serves both as a law mandating what a legislator *must* do, as well as a law mandating what a legislator *may not* do. Hence, it can function as a legal authority both for the legislator determining what the law shall be and for the adjudicator determining what the law is. Such a constitutional world allows room for negative, as well as affirmative, constitutional rights. The identification of a right as constitutional marks it as law—legally obligating somebody to do something or to refrain from doing something—but not as something which courts enforce to constrain the reach of politics.

Recall that some of the rights of man for which Paine argued were indisputably positive, just as others were undeniably negative. Paine makes this explicit in his discussion of the difference between those natural rights that are retained by individuals after entering civil society and those rights, like that of self-protection, that are regulated by the state.¹¹⁶ In a typical passage of *Rights of Man*, the substance of which Paine repeats elsewhere for emphasis, he explains:

Natural rights are those which appertain to man in right of his existence. . . . Civil rights are those which appertain to man in right of his being a member of society. Every civil right has for its foundation some natural right pre-existing in the individual, but to which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.

. . . .

The natural rights which he retains, [after entering into civil society] are all those in which the *power* to execute is as perfect in the individual as the right itself. Among this class . . . are all the intellectual rights, or rights of the mind: consequently, religion is one of those rights. The natural rights which are not retained, are all those in which, though the right is perfect in the individual, the power to execute them is defective. . . . A man, by

¹¹⁶ Paine, *Rights of Man*, Part One, *supra* note 2, at 464–65.

natural right, has a right to judge in his own cause; and so far as the right of the mind is concerned, he never surrenders it: But what availeth it him to judge, if he has not power to redress? He therefore deposits this right in the common stock of society, and takes the arm of society, of which he is a part, in preference and in addition to his own. . . .

. . . .

[C]ivil power, properly considered as such, is made up of the aggregate of that class of the natural rights of man, which becomes defective in the individual in point of power, and answers not his purpose; but when collected to a focus, becomes competent to the purpose of every one.¹¹⁷

Paine drew from this the inference that the state has an obligation, not just the power, to legislate in a way that guarantees the minimal welfare of all citizens, particularly the poor and the aged.¹¹⁸ For Paine, this meant that an activist state should oversee the direct repayment to the poor, on a schedule tied to their needs, of funds sufficient to guarantee their minimal welfare.¹¹⁹ In *Rights of Man* he laid out, in considerable detail, that schedule. The grounds for this state obligation, Paine later argued in his short pamphlet *Agrarian Justice*, were decidedly not charity.¹²⁰ Rather, he thought that the condition of the poor, at least in England, was directly attributable to the corruption and self-serving nature of aristocratic and monarchic government. Because English government was so profoundly antidemocratic, it had unconscionably exploited the poor, primarily through regressive taxation.¹²¹ Repayment to the poor through tax rebates thus should be understood as their right. Indeed, it should be understood as among the rights of man:

¹¹⁷ Id.

¹¹⁸ Paine, *Rights of Man*, Part Two, *supra* note 2, at 604–57.

¹¹⁹ Id. at 624–27.

¹²⁰ Tom Paine, *Agrarian Justice*, in *Collected Writings*, *supra* note 1, at 405–06 [hereinafter Paine, *Agrarian Justice*].

¹²¹ Id. at 406–11; see also Paine, *Agrarian Justice*, *supra* note 120, at 400–01 (decrying the landed monopoly); Paine, *Rights of Man*, Part Two, *supra* note 2, at 605–25 (discussing “defects of the English government,” taxes generally, and the poor tax).

Civil government does not consist in executions; but in making that provision for the instruction of youth, and the support of age, as to exclude, as much as possible, profligacy from the one, and despair from the other. Instead of this, the resources of a country are lavished upon kings, upon courts, upon hirelings, imposters, and prostitutes; and even the poor themselves, with all their wants upon them, are compelled to support the fraud that oppresses them. . . .

....

It is the nature of compassion to associate with misfortune. In taking up this subject I seek no recompence—I fear no consequence. Fortified with that proud integrity, that disdains to triumph or to yield, I will advocate the Rights of Man.¹²²

Just prior to his death, in the pamphlet *Agrarian Justice*, Paine went considerably further, both in theory and in advocacy, urging the creation of a common fund from which every person, upon reaching the age of twenty-one, would receive a “stakeholder”-style payment, so as to ameliorate the condition of man.¹²³ By the time he wrote *Agrarian Justice*, Paine’s basic intuition had evolved considerably from that spelled out in *Rights of Man*. Economic injustice, Paine argued, was not solely due to corrupt civil government. As he eventually came to see it, the problem was that although some people benefit, and hugely, from the transition from the state of nature to civilization, many are made miserable by the same transition.¹²⁴ The cultivation of nature and society, through the ownership and use of land, that is essential for the advancement of civilization deprives the inhabitants of the natural world of their right: the use of the land for their support and well-being. As a consequence, the transition to civilization—of which private property is a central and necessary institution—*itself* causes a deprivation of right.¹²⁵ The transition enhances the lives of many through the advent of culture and civility, but it leaves at least as

¹²² Paine, *Rights of Man*, Part Two, *supra* note 2, at 604.

¹²³ Paine, *Agrarian Justice*, *supra* note 120, at 400–11.

¹²⁴ *Id.* at 398–401.

¹²⁵ *Id.* at 400.

many worse off than they would have been in the state of nature.¹²⁶ These unequal effects, Paine argued, are contrary to justice, and compensation ought to be paid. Paine summarizes his case for the stakeholder society thusly:

Cultivation is, at least, one of the greatest natural improvements ever made by human invention. It has given to created earth a ten-fold value. But the landed monopoly, that began with it, has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance, without providing for them, as ought to have been done, as an indemnification for that loss, and has thereby created a species of poverty and wretchedness, that did not exist before.

In advocating the case of the persons thus dispossessed, it is a right and not a charity that I am pleading for. But it is that kind of right which, being neglected at first, could not be brought forward afterwards, till heaven had opened the way by a revolution in the system of government. Let us then do honour to revolutions by justice, and give currency to their principles by blessings.¹²⁷

CONCLUSION

We have largely abandoned Paine's constitution, as well as his generous understanding of the rights of man. We do not have a constitution directed at legislatures rather than courts, enforced through legislative fealty and regularly amended through popular, representative politics. Nor do we have a rights tradition that compensates the losses sustained by those who have been hurt, rather than benefited, by the processes of privatization and civilization, that protects the weak against the overreaching of the strong, or that assures direct payments to the poor of monies taken from the public purse. None of this had to be. The Constitution is as silent on the question of legislative review as it is on the question of judicial review. Our amendment process could be used, rather than ignored, to keep the Constitution reflective of political will. Legisla-

¹²⁶ Id.

¹²⁷ Id.

tors could assume obligations implicitly and explicitly imposed upon them for the protection of constitutional values. Likewise, our “rights tradition,” particularly if we date it from the time of the Reconstruction Amendments, can be read to include a case for the positive rights of welfare, security, and protection against private violence, as a number of commentators have argued.¹²⁸

The difficulty in locating those rights within our constitutional history is not that they cannot be found in the Constitution’s text, or do not follow from precedent, or cannot be pegged to significant constitutional events. Instead, it may be that our loss of Paine’s constitution and our inability to develop the most generous understanding of our rights tradition are connected phenomena. The difficulty we have in locating positive rights within our constitutional history might in part result from a deeper loss: our lost sense of the Constitution as a law for governors that emanates directly from the will of the people rather than from the interpretive prowess of apolitical courts—a law that keeps the legislator’s feet to the fire, tells the governor toward what republican ends he should be governing, and directs both toward justice and the good of the community rather than toward political gain. To return to Paine’s remarkable advocacy, it may well be that only by recapturing the idea of the Constitution as a “law for governors” rather than a “law for courts” will we be able to give legislative content to his much loved “rights of man.” Finally, that may also be the only way for us to understand those rights in the expansive and generous way he would have wished, including a right of compensation for the unequal losses that result from entering a regime of private property.

To recapture Paine’s idea of the Constitution, however, we will also have to recapture what was most natural for him: a jurisprudential conception of law as a moral norm of governance, produced democratically, that guides as well as restrains our chosen governors. By doing so we may regain more than a sense of why we might be justified in regarding such law as king. We might also, and not coincidentally, gain a sense of how to “honour [our American] revolution[] by justice,” and “give currency to [its] principles by blessings”¹²⁹—through the democratic recognition of constitutional

¹²⁸ *Id.* at 400.

¹²⁹ *Id.*

rights to security and well-being. That, it is worth recalling, is something our revolutionary pamphleteer also exhorted us to do.